In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1369

COCA-COLA BOTTLING COMPANY OF NEW YORK, INC., PETITIONER

v.

CARMINE PALMAROZZO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This suit was instituted by the respondent veteran charging that the petitioner had violated the Military Selective Service Act, 50 U.S.C. App. 459, by refusing to include in its calculation of "service credits" for purposes of severance pay the time Palmarozzo had spent in active military service. The district court granted summary judgment in Palmarozzo's favor and the court of appeals affirmed.

1. Palmarozzo was employed by Coca-Cola on June 4, 1962. On September 21, 1962, he began serving six months of active military duty. He returned to Coca-Cola on March 23, 1963, upon his release from active duty, and remained with the company until June 22, 1967, when he voluntarily terminated employment. Palmarozzo thereafter applied for $200.00 in severance pay (Pet. 4).

By contract with Palmarozzo's union, Coca-Cola was obligated to contribute 20 cents for every hour worked by each employee into a union retirement fund. The rules of the retirement fund provided that severance pay was available to any employee who had terminated employment after accumulating five or more "service credits." An employee earned ¼ of a service credit for every 400 hours actually worked. Overtime, however, was excluded from these calculations, and no more than one service credit (representing 1600 hours) could be earned in any year. Severance benefits increased with every five service credits, *i.e.*, with every five years of continuous service (Pet. 5-6, 18).

During his five years with Coca-Cola Palmarozzo had accumulated four and one-half service credits. But for his six months of military service he would have earned five such credits. Petitioner, however, refused to include Palmarozzo's military time in its service credit calculations and denied Palmarozzo's severance pay request.

Palmarozzo, represented by the Department of Justice pursuant to 50 U.S.C. App. 459(d), then brought this suit under the Military Selective Service Act, alleging that Coca-Cola was required to count his time in military service in the computation of severance pay. The district court granted summary judgment for Palmarozzo. The court of appeals affirmed, holding that the severance benefits were a perquisite of seniority protected by the Act.

2. Petitioner contends that its severance pay plan was based on the actual rendering of services and that it was therefore not a perquisite of seniority but rather one of the "other benefits" envisaged by Section 459(c) of the Military Selective Service Act. This Court, however, in *Accardi* v. *Pennsylvania Railroad Company*, 383 U.S. 225, 229-230, held that:

> The term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country.[1]

The right at stake in the present case, as in *Accardi,* is the right to severance pay. As in *Accardi,* the conclusion that severance pay is an incident of seniority is bolstered by the particular formula of the plan. In *Accardi,* the "bizarre results" of the plan's formula belied the argument that the severance pay was in fact compensation for actual work performed. Here, as the court below observed, Coca-Cola's plan "gave one credit for each year of continuous service, based benefits on five-year plateaus of accumulated credits, and allowed no credit for overtime or work in excess of 1600 hours per year" (Pet. App. 20). Thus, "length of continuous service, rather than the nature of that service, produced the benefits" (Pet. App. 20). In short, as in *Accardi,* the severance pay here accrues with years of service, and, as this Court held in *Accardi,* "* * * the amount of these [severance] allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." 383 U.S. at 230.

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[1]The Court also indicated that the "other benefits" provision was designed to provide company benefits during the period of military service, not to limit the veteran's rights after he returns to his job. 383 U.S. at 231-232. But see *Eagar* v. *Magma Copper Co.,* 389. U.S. 323, 325 (dissenting opinion).

Petitioner contends that the decision of the court below conflicts with decisions of other appellate courts, relying on *Hoffman* v. *Bethlehem Steel Corp.*, 477 F. 2d 860 (C.A. 3); *Dugger* v. *Missouri Pacific Railroad Co.*, 403 F. 2d 719 (C.A. 5), certiorari denied, 395 U.S. 907; and *Kasmeier* v. *Chicago, Rock Island & Pacific Railroad Co.*, 437 F. 2d 151 (C.A. 10). None of these cases dealt with severance pay. *Dugger* and *Kasmeier* involved a question of entitlement to vacation leave under a collective bargaining agreement which required employees to have performed 110 days of compensated service in the previous year in order to qualify for vacation leave. In holding that veterans who had not satisfied the 110-day requirement because of their service in the armed forces were not entitled to vacation leave, the courts in *Dugger* and *Kasmeier* distinguished *Accardi* as involving benefits based only on tenure rather than on an actual work standard.[2]

In *Hoffman* entitlement to unemployment benefits was at issue. The benefits were governed by a plan which provided that an employee would receive one-half credit for every 40 hours worked and benefits were based on the number of credits received. Under the plan, 40-hour weeks were defined as any week in which an employee worked one hour. The court of appeals held that the actual work requirement was in fact a sham and the veteran was granted recovery.

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[2]We suggest in our petition for certiorari in *Foster* v. *Dravo Corp.*, No. 73-1773, filed May 25, 1974, that the court in *Kasmeier* incorrectly interpreted *Accardi* in the context of vacation pay benefits. That question is not at issue in this severance pay case.

These cases thus should not be read, as petitioner apparently contends, as indicating that any work requirement as a prerequisite to benefits removes such benefits from protection as seniority rights under the Act. Indeed, the agreement in *Accardi* itself contained a work requirement, since it based the amount of severance pay on the length of "compensated service." 383 U.S. at 227-228. This Court nevertheless concluded that:

> * * * the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job * * * [which] increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances, since they are giving up more rights and benefits than those with less seniority. [383 U.S. at 230.]

That analysis is equally applicable here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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